

15 East 48th Restuarnt, Inc., d/b/a Sagapo Restaurant and Sagapo Restaurant, Inc., its Agent and Local 6, Hotel, Restaurant & Club Employees & Bartenders International Union, AFL-CIO.
Case 2-CA-17173

September 9, 1981

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On February 27, 1981, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed cross-exceptions and a brief in support of its cross-exceptions and in support of the remainder of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rules, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

While we agree with the Administrative Law Judge that Respondent unlawfully interrogated and threatened its employees in violation of Section 8(a)(1) of the Act, we do not agree with his findings that Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging employees Steve Stamatopoulos and Matheos Kiropoulos, and by transferring employee John Marinis from one shift to another and thereafter discharging him.

Respondent is a Greek night club and restaurant located in New York, New York. It is managed by one of its owners, Kimon Makris. The record reveals that on or about March 14, 1980,¹ Stamatopoulos, who worked as Respondent's day-shift bartender,² was accused by Makris of being short approximately \$55 in his daily register receipts. Several days later, on Saturday, March 22, Stamatopoulos met with Marinis, who was the night-shift bartender, at a nearby fast food restaurant where they discussed their working conditions and, at Stamatopoulos' suggestion, agreed to seek assistance from a union. On Monday, March 24, prior to reporting for work, Stamatopoulos visited the offices of the Charging Party Union and obtained authorization cards from a union official named Martin. Upon reporting to work, Stamatopoulos gave some

of the cards to Marinis³ and hid the rest in a desk located in a locker room where employees frequently changed. Somehow, some of these cards were subsequently discovered in Makris' office.⁴

According to Marinis' uncontradicted testimony, shortly after he signed an authorization card, Respondent's maitre d', Frank Koutsiftis, an admitted agent of Respondent, informed Marinis that some blank authorization cards had been found in Makris' office and that Makris believed that Marinis had brought them into the restaurant. Furthermore, he informed Marinis that during a conversation with another of Respondent's owners, Makris had stated that Marinis was going to be fired. Koutsiftis then told Marinis not to worry, as he would talk to Makris, but that Marinis should let someone else do the organizing. Koutsiftis admitted telling Marinis that he should stop his organizing activities. He also admitted to telling him that he (Marinis) could be fired if he made the smallest mistake.

Marinis further testified, without contradiction, that one or two days after his conversation with Koutsiftis, Makris asked him why he wanted to bring in the Union, which Marinis initially denied wanting to do. However, when Makris accused him of lying, Marinis admitted wanting to bring in a union and thereafter offered to resign. Makris nevertheless allowed him to remain on the job.

Stamatopoulos also testified without contradiction that he was similarly questioned by Makris. Thus, he testified that on or about March 24 or 25 Makris summoned him into his office and, after asking Stamatopoulos if he was happy with his job, accused him of having brought the authorization cards into the restaurant. When Stamatopoulos denied having done so, Makris stated that he believed Stamatopoulos and added that he would find out who had brought in the cards.

Kiropoulos, who worked in the kitchen, signed an authorization card on March 25. According to his undisputed testimony, shortly after signing the card, Night Manager Antonakos asked him if he had signed a card and Kiropoulos acknowledged having done so.

According to Stamatopoulos' uncontradicted testimony, on March 28, Antonakos told Stamatopoulos that he was fired because Makris had said that he had been receiving complaints from the waiters.

³ The record reveals that the authorization cards obtained by Stamatopoulos were not the proper ones and that Marinis subsequently obtained new ones from the Union. He thereafter distributed the new cards to several employees and he and Stamatopoulos signed cards on March 25 and 26, respectively.

⁴ Although the record is silent as to how the cards wound up in Makris' office, Makris testified that he had been informed by his night manager, Kostas Antonakos, that "some union cards" had been found.

¹ All dates hereinafter are in 1980, unless otherwise indicated.

² Respondent maintains two shifts of employees, a day shift which works from 11 a.m. to between 5:30 p.m. and 7 p.m., and an evening shift which works from 7 p.m. until 4 a.m.

When Stamatopoulos sought to inquire from Makris the reason for his discharge, Makris responded by saying, "The case is closed, that's all."

Kiropoulos was also terminated on the following day, March 29. According to his undisputed testimony, as he was leaving work at the end of the evening shift, Antonakos informed him that he was being terminated. When Kiropoulos asked why he was being terminated, Antonakos responded by saying that he had been instructed to "stop" Kiropoulos.

On March 31, Stamatopoulos, Kiropoulos, and Marinis went to the Union's office to seek assistance in getting Stamatopoulos and Kiropoulos reinstated. That same day, two union representatives visited Makris, informed him of the employees' visit to the Union's office, and accused Makris of having discharged Stamatopoulos and Kiropoulos because of their union activities. Makris denied the accusation. Later that day, when Kiropoulos went in to pick up his final paycheck, Antonakos told him that he had found out everything and that he knew that Kiropoulos, Stamatopoulos, and Marinis had gone to the Union. Marinis similarly testified that, when he arrived for work that evening, Makris told him that he (Makris) had found out that the employees had gone to the Union and with whom they had spoken. He then told Marinis, "I know exactly what you are doing, every step that you take I know. . . ."

Either on Friday, April 4, or Saturday, April 5, Makris informed Marinis that he was being transferred to the day shift. Makris testified that the reason for transferring Marinis from the night shift to the day shift was because of the need for a day-shift bartender resulting from Stamatopoulos' termination, and because Marinis allegedly had been having arguments with the night-shift waiters over tips. When told of the shift change, Marinis stated that he preferred the night shift but would work the day shift if requested to do so.

On Monday, April 7, Marinis reported for work at 7 p.m. and, while changing into his work clothes, was approached by Makris who asked him why he had not reported for the day shift as he had been instructed to do. When Marinis responded that he did not know that he was supposed to start that day,⁵ Makris discharged Marinis by in-

forming him that his last working day would be Saturday, April 12. The record reveals that Koutsiftis, after learning of Marinis' discharge, sought to intervene on Marinis' behalf by telling Makris that if Marinis were retained he (Marinis) would not be involved in union activity. Makris, denying that union activities had played a part in Marinis' discharge, refused to reconsider his decision.

In agreement with the Administrative Law Judge, we find that Respondent violated Section 8(a)(1) of the Act when Makris interrogated Stamatopoulos and Marinis concerning the union cards found in his office, when Antonakos interrogated Kiropoulos as to whether he had signed an authorization card, and when Koutsiftis warned Marinis that he could not be fired for his union activities. However, as noted above, we find, contrary to the Administrative Law Judge, that Respondent violated Section 8(a)(3) and (1) of the Act by transferring Marinis from the night to the day shift and thereafter discharging him, and by discharging Stamatopoulos and Kiropoulos.

Respondent contends, and the Administrative Law Judge found, that Stamatopoulos was discharged for being short \$55 in his daily register receipts of March 14. The record, however, does not support that finding. Rather, as noted above, Stamatopoulos was told by Antonakos that he was being discharged because of complaints Makris had purportedly received from waiters, and not for any shortage in his daily register receipts. In this regard, we note that when Stamatopoulos sought to ascertain from Makris the true reason for his discharge, Makris refused to discuss the matter stating only that the case was closed. Additionally, the record reveals that since he began working for Respondent on February 14 Stamatopoulos had been short in his daily register receipts approximately 80 percent of the time but had never been disciplined or warned for such shortages. In fact, when the March 14 shortage was discovered, Makris merely informed Stamatopoulos of the shortage but took no immediate action against Stamatopoulos nor indicated to him that some form of disciplinary action would be forthcoming. Instead, Stamatopoulos was allowed to remain on the job where, in spite of his continued receipt shortages, no action was taken against him. It was only after Stamatopoulos had initiated the organizational activity among Respondent's employees, had obtained the

⁵ Although the Administrative Law Judge found that Makris told Marinis that he was to begin working the day shift on Monday, April 7, we conclude that the record does not support such a finding. Thus, while Makris, when questioned by Respondent's attorney, testified that he told Marinis when to report for the day shift, on cross-examination, he testified only that he told Marinis that he was being transferred to the day shift. Additionally, Koutsiftis' testimony that Marinis was discharged for failing to show up a third time for the day shift is inconsistent with Makris' testimony that Marinis was discharged for failing to report the first time on April 7, as purportedly required to do. Finally, we note that

the Administrative Law Judge, in finding that Marinis "let it slip" that he was told to start on Monday, April 7, has misconstrued the record by taking Marinis' testimony out of context. Rather, contrary to Respondent's witnesses, Marinis consistently testified that he was not told when to report for the day shift. In view of the above, we find that while Respondent informed Marinis that he was being transferred to the day shift, it did not inform him of the effective date of the transfer.

first set of union authorization cards, had been accused by Respondent of being responsible for bringing the cards into the restaurant, and had signed an authorization card for the Union that his performance as an employee was found sufficiently deficient to warrant his discharge. Indeed, just 2 days after he signed his authorization card and within 1 week of having commenced his union activity, Stamatopoulos was discharged without warning and without a replacement having been obtained⁶—and then for a reason other than the one advanced by Respondent at the hearing. Thus, in view of the timing of the discharge to his union activities, the shifting reasons given for his discharge, and Respondent's acceptance, until the advent of the Union on the scene, of the frequent shortages in Stamatopoulos' cash receipts, we conclude that the March 14 shortage was not the actual reason for Stamatopoulos' discharge. Rather, we find that Respondent seized upon the March 14 shortage as a pretext to discharge Stamatopoulos for his union activities,⁷ in violation of Section 8(a)(3) and (1) of the Act.

With respect to Kiropoulos, the Administrative Law Judge found that he was discharged for holding a second job which purportedly had adversely affected his job performance, and because Respondent determined that it no longer needed a "salad man," the position held by Kiropoulos prior to his discharge. Contrary to the Administrative Law Judge, we find that these were not the real reasons for Kiropoulos' discharge.

Kiropoulos admittedly held a second job while working for Respondent. The record, however, reveals that he had held this second job since prior to December 14, 1979, the date he was hired by Respondent and, although Respondent asserts that the second job resulted in a poor work performance, there is no record evidence to indicate that Kiropoulos had ever been disciplined or warned for any alleged poor work performance on his part. To the contrary, the only warnings which Kiropoulos apparently received were for sitting with his feet propped up against another chair. Additionally, while Makris testified that Respondent had a policy forbidding employees from holding second jobs, there is no evidence to indicate that the

policy was a written one or that it was ever communicated to Respondent's employees, including Kiropoulos. Furthermore, when questioned by the General Counsel as to when he found out about Kiropoulos' second job, Makris could not recall if it was early in Kiropoulos' employment period or prior to his discharge. In light of this fact, there can be no basis for finding that Respondent discharged Kiropoulos for disregarding its purported policy against employees holding two jobs. Under these circumstances, we find that there is no merit to Respondent's assertion that Kiropoulos was terminated because of poor work performance or that his work performance played a part in his discharge.⁸

Similarly, we find Respondent's other asserted reason for terminating Kiropoulos (i.e., that it no longer needed a "salad man") to be without foundation and therefore also pretextual. According to Makris, early in March he and Antonakos decided that because business was slow they would eliminate the "salad man" position. However, while that decision was purportedly made in early March, Kiropoulos was not terminated until March 29, just a few days after signing a union card and after responding affirmatively to Anatonakos' unlawful inquiry of whether or not he had signed a card. Respondent has offered no explanation as to why it waited so long to discharge Kiropoulos when its decision to eliminate the position was purportedly made in early March.⁹ Furthermore, we note that Kiropoulos was offered no explanation for his discharge but rather was cryptically told by Antonakos that he had been ordered to "stop" Kiropoulos. In our view, the above circumstances and the timing of the discharge to Kiropoulos' admission to Respondent that he had signed a union card give rise to an inference, which we draw, that another reason—Kiropoulos' support of the Union—motivated Respondent into terminating this employee.¹⁰ Thus, in the words of Antonakos, Respondent sought to "stop" Kiropoulos from engaging in any further union activities by discharging him.¹¹ Ac-

⁸ Indeed, Respondent itself appears largely to have discounted poor work performance as a reason for Kiropoulos' discharge since during the hearing and in its brief to the Board, Respondent asserted that the "primary reason" for discharging Kiropoulos was because it no longer needed a "salad man."

⁹ Respondent contends that it did not hire another person to do the salad work previously done by Kiropoulos. However, its record of the hours worked by employees, which was subpoenaed by the General Counsel, contain the notation "SAL" next to the name of an employee subsequently hired by Respondent, and while Respondent would have us believe that "SAL" stands for second cook, we find it more probable that said notation was meant to indicate that the new employee was performing the "salad" work which Kiropoulos had previously done.

¹⁰ *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966).

¹¹ It is undisputed that after signing his union authorization card, Kiropoulos sought to solicit a card from at least one other employee.

⁶ Makris testified that the decision to discharge Stamatopoulos was made 1 or 2 days after it learned of the March 14 shortage and that soon thereafter Respondent contacted several employment agencies in an effort to obtain a replacement for Stamatopoulos. No explanation, however, was offered by Respondent as to why, after having allowed Stamatopoulos to remain on the job for so long after the alleged shortage occurred, it arbitrarily chose to discharge him on March 29 without first obtaining a replacement.

⁷ Although Respondent denies having had knowledge of Stamatopoulos' union activities, Koutsiftis, the maitre d', admitted that he had been told, prior to Stamatopoulos' discharge, which employees had signed union authorization cards and which had not.

cordingly, we find that in discharging Kiropoulos for his union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

As for Marinis, we find no merit to Respondent's assertion that its reason for wanting to transfer Marinis from the night shift to the day shift was because it needed someone to replace Stamatoopoulos as the day-shift bartender. As noted earlier, Makris testified that, upon discovering the March 14 shortage, Respondent contacted several employment agencies in an attempt to obtain a replacement for Stamatoopoulos. He further testified that within a week to 10 days, Respondent had hired a Mr. Katz to replace Stamatoopoulos.¹² It is therefore apparent from Makris' own testimony that Respondent had not considered replacing Stamatoopoulos with Marinis but instead had hired another employee to assume Stamatoopoulos' duties. Furthermore, Respondent has failed to explain why, if Marinis was to be Stamatoopoulos' replacement, it did not immediately effectuate the change on March 14, when the shortage in the cash receipts was discovered, or on March 28, when Stamatoopoulos was finally discharged. Also, it is significant to note that in its brief to the Board Respondent asserts that the reason for wanting to change Marinis to the day shift was because Marinis was fighting with the night waiters over tips.¹³ No mention whatsoever is made of Respondent's earlier contention that Marinis was needed to replace Stamatoopoulos. Thus, in view of the shifting reasons given for wanting Marinis transferred to the day shift, the earlier threat to discharge him for his union activities, the unlawful interrogation by Makris and Makris' comment that he knew everything Marinis was doing,¹⁴ we find that Respondent's transfer of Marinis to the less desirable day shift was motivated solely by antiunion considerations and was therefore in violation of Section 8(a)(3) and (1) of

the Act.¹⁵ Furthermore, as noted above, Marinis' discharge resulted directly from his purported failure to comply with the transfer to the day shift. Since the transfer itself was motivated by antiunion considerations and thus was illegal, we find that the resulting discharge of Marinis was similarly motivated and also violated Section 8(a)(3) and (1) of the Act.¹⁶

REMEDY

Having found that Respondent unlawfully transferred and discharged employees for having engaged in union activities, and having found that Respondent engaged in further unlawful conduct by threatening its employees with discharge, interrogating them, and creating the impression of surveillance, we shall order it to cease and desist therefrom, and to take certain affirmative action which we find will effectuate the purposes to the Act.

Respondent will be required to offer Steve Stamatoopoulos, Matheos Kiropoulos, and John Marinis full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and to make them whole for any loss of earnings they may have suffered by reason of the discrimination practiced against them, such earnings to be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, 15 East 48th Restaurant, Inc., d/b/a Sagapo Restaurant and Sagapo Restaurant, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Transferring its employees from one shift to another, discharging, or otherwise discriminating

¹² Katz began working shortly after Marinis was discharged.

¹³ We also find this reason to be pretextual. Thus, while the record reveals that Marinis had quarreled with the night waiters over tips, it further reveals that the matter was resolved in late January when Makris asked the waiters to share their tips with Marinis, stating "I think it's fair." Furthermore, when asked if the arguments continued after the waiters began sharing their tips, Makris admitted that he did not know. Additionally, Respondent at the hearing indicated that "another" reason for wanting Marinis on the day shift was because it had "faith" that Marinis could resolve the difficulties the day-shift waiters were having with their woman day manager. However, it is inconceivable to us that Respondent would transfer an employee, who it claims was having problems with the night waiters, to the day shift to resolve a dispute between the day waiters and their manager.

¹⁴ The Administrative Law Judge found that Respondent did not create the impression of surveillance when Makris informed Marinis that he knew exactly what Marinis was doing and every step Marinis took and when Antonakos informed Kiropoulos that he knew that the employees had visited the Union. However, in view of the unlawful nature of the discharges as well as Respondent's other unlawful conduct, we are convinced that Respondent sought, through the above comments, to create the impression that its employees activities were being kept under surveillance, in violation of Sec. 8(a)(1) of the Act.

¹⁵ Although the complaint alleges the change of shift only as an 8(a)(1) violation, we are not precluded from finding that such conduct was also violative of Sec. 8(a)(3) of the Act since, as noted above, the shift change was motivated by Respondent's opposition to Marinis' activities on behalf of the Union and was designed to discourage any such further union activities.

¹⁶ Our finding in this regard is supported by the fact that, as noted earlier, Marinis was never advised as to when to report to the day shift.

¹⁷ Member Jenkins would compute interest in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

against them because of their support for or membership in Local 6, Hotel, Restaurant & Club Employees & Bartenders International Union, AFL-CIO, the Union herein, or any other labor organization.

(b) Conveying to its employees the impression that it is engaging in the surveillance of their union or other protected concerted activities.

(c) Interrogating its employees concerning their union sympathies and activities.

(d) Threatening its employees with discharge or other reprisals if they join or support the Union or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action which is necessary to effectuate the policies of the Act:

(a) Offer Steve Stamatopoulos, Matheos Kiropoulos, and John Marinis full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in New York, New York, copies of the attached notice marked "Appendix."¹⁸ Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places at all locations where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order,

what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT transfer our employees from one shift to another, discharge, or otherwise discriminate against them because of their support for or membership in Local 6, Hotel, Restaurant & Club Employees & Bartenders International Union, AFL-CIO, or any other labor organization.

WE WILL NOT give our employees the impression that we are engaging in the surveillance of their union or other protected concerted activities.

WE WILL NOT interrogate our employees concerning their union sympathies and activities.

WE WILL NOT threaten our employees with discharge or other reprisals if they join or support the above-named, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Steve Stamatopoulos, Matheos Kiropoulos, and John Marinis full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of pay they

¹⁸ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

may have suffered by reason of our discrimination against them, with interest.

15 EAST 48TH RESTAURANT, INC.,
D/B/A SAGAPO RESTAURANT AND
SAGAPO RESTAURANT, INC., ITS
AGENT

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: This case was heard by me on December 4 and 5, 1980, based on a complaint issued by the Regional Director of Region 2 on June 9, 1980.¹ The initial charge in the proceeding was filed by the Union on April 1, a first amended charge was filed on April 16, and a second amended charge was filed on May 27.

The issues raised by the complaint, as amended at the hearing, are as follows:

1. Whether in March, Respondent by Kimon Makris and Kostas Antonskos interrogated employees regarding their membership in, and activities on behalf of the Union.

2. Whether in March, Respondent by Frank Koutsiftis and Kimon Makris threatened to discharge employees for engaging in union activities and distributing authorization cards on behalf of the Union.

3. Whether in March, Respondent by Kimon Makris and Kostas Antonakos created an impression that its employees' union activities were under surveillance.

4. Whether in March, Respondent by Kimon Makris threatened to change the hours of employees because they joined, supported, or assisted the Union.

5. Whether the discharges of Steve Stamatopoulos on March 28 and Matheos Kiropoulos on March 29 were violative of Section 8(a)(3) of the Act because motivated by said employees' union activities.

6. Whether the change in John Marinis' hours from the night shift to the day shift was motivated because of that employee's union activities.

7. Whether the discharge of Marinis on April 12 was violative of Section 8(a)(3) of the Act because it was motivated by his union activities.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The parties agree that Respondent operates a night club and restaurant located at 15 East 48th Street in the city and State of New York. It is conceded that during the past year the Respondent had gross revenues in excess of \$500,000 and that it purchased goods and materials valued in excess of \$50,000 directly from points located outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce

within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A crucial issue in this case is when the employees first engaged in any activity to obtain union representation at Respondent. According to John Marinis, the night bartender, he along with Matheos Kiropoulos, Steve Stamatopoulos, and another employee named Tom decided to obtain union representation sometime in March. However, Kiropoulos, who was employed in the kitchen making salads, indicated in his testimony that the first time he became involved with the Union was when he signed a union card given to him by Marinis on the corner of 48th Street and Fifth Avenue on March 25 and thereafter asked Mario, a cook, to join the Union. The testimony of Steve Stamatopoulos, the day bartender is somewhat contradictory on this matter. Initially, he testified that he and Marinis had a discussion about unionizing the restaurant in late February at a restaurant called Arthur Treacher's Fish and Chips. However, Stamatopoulos later acknowledged that his meeting with Marinis at the fish restaurant took place on Saturday, March 21, that he spoke to no one else about the Union prior to the meeting, and that he arranged for this meeting with Marinis shortly after he had been accused of being \$55 or \$56 short in his cash register. Needless to say, Respondent asserts that it decided to discharge Stamatopoulos when the cash shortage was discovered and waited until March 28 to do so only because it needed time to obtain his replacement.

In any event, it appears that as a result of the meeting between Marinis and Stamatopoulos on March 21, which I conclude is when the union activity commenced, Stamatopoulos went to the offices of the Union, obtained union authorization cards, and brought them back to Respondent's facility where he hid them in a desk in the locker room. It is acknowledged by all parties that somehow, some of these unsigned cards found their way into the office of Kimon Makris, one of Respondent's owners. It also is established that, after these cards were discovered, John Marinis went back to the Union to obtain new cards which some of the employees executed around March 25. As noted above, Kiropoulos signed such a card on that date.

According to Marinis, he was told by Koutsiftis, the maitre d' that the original set of cards had been found in Makris' office and that Makris thought that Marinis had brought them in. Marinis testified that Koutsiftis told him that Makris was talking with another of the owners and that "they're going to fire you." According to Marinis, Koutsiftis told him that he was going to talk to Makris, that he should not worry about it, but that Marinis should let someone else do the organizing. Marinis also testified that, a day or two later, Makris asked him why he wanted to bring the Union in, to which he initially responded that he did not want to do so. He states that Markis accused him of lying and that he then told Makris that he was sorry and thereupon admitted that he had brought the Union in. According to Marinis, he then

¹ Unless otherwise indicated, all dates are in 1980.

offered to resign but Makris refused the offer and told him to go back to work. On another day, Marinis asserts that Makris told him that he had no right to solicit employees in the restaurant and that he, Marinis, denied that he had done so at work.

According to the testimony of Stamatopoulos, he was called into Makris' office on March 24 or 25 and asked if he was happy with his job. He stated that he was then accused of bringing in the union cards, which he denied. He stated that Makris said that he believed him and asserted that he would find out who brought them in. According to Stamatopoulos, this was the only conversation he had with any of the managers or supervisors of Respondent about the Union. Kiropoulos for his part states that he was asked by the night manager, Kostas Antonakos, if he had signed a union card which he acknowledged. He asserts that this conversation took place about 2 or 3 days before his discharge.

Makris acknowledges that he asked Marinis and Stamatopoulos about the union cards which were found in his office. In this regard, he testified that he did so after asking his managers about the cards because he wanted to ascertain who had gained entrance to his office which is locked, and where cash, checks, and records are kept.² He states that aside from the managers, the partners, the cashier, and the maitre d' who had keys, the only other people who had permissible access to the office were Marinis and Stamatopoulos because they got their cash there and returned their receipts to the office each day.³ Makris asserts that the only conversations he had with these two men about the Union were when he asked them if they had placed the union cards in his office.

Koutsiftis testified that, sometime after the union cards were discovered in Makris' office, he told Marinis, in effect, that he should stop his organizing activity and that he could be fired if he made the smallest mistake. Koutsiftis testified that he told this to Marinis because Marinis was his "best friend,"⁴ and he was telling Marinis, as a matter of personal advice, not be involved with the Union because, based on his own experiences, companies would use the least excuse to discharge someone who was involved with a union. According to Koutsiftis, Marinis then agreed to stop his union activity.

It is agreed by the parties that Stamatopoulos was discharged on March 28. As noted above, the Company asserts that the decision to discharge him was made upon the discovery of the major cash shortage in his cash register⁵ and that the only reason it kept him on until March 28 was to find a replacement. It also is noted that the shortage accusation in question occurred, according to Stamatopoulos, before any union activity commenced

and therefore it cannot be asserted that this accusation was made in an effort to find a pretext for his discharge. It is also clear from Stamatopoulos' own testimony that such an accusation may reasonably be construed as an allegation of theft.

Upon the discharge of Stamatopoulos as the day bartender, Makris directed John Marinis to go from the night shift to the day shift so as to take the place of Stamatopoulos. This occurred on Friday or Saturday, April 4 or 5. In this regard, Makris testified that he decided to put Marinis on the day shift because he needed someone to replace Stamatopoulos and because Marinis was having arguments with the night waiters⁶ and the night manager.⁷

According to Makris, he told Marinis that he was to start on the day shift on Monday, April 7. Marinis initially testified that, although he was told to switch to the day shift, he asserted that he was not told on what day he was supposed to start. However, during cross-examination, Marinis let it slip that he was, in fact, told to start the day shift beginning on Monday.⁸

On Monday, April 7, Marinis arrived at work at 7 p.m. rather than at 11 a.m. When asked why he had not shown up at the proper time, Marinis responded that he did not realize he was supposed to start the day shift on that day. Makris thereupon told Marinis that his last day of work would be on Saturday, April 12.

Matheos Kiropoulos was discharged on March 29. In connection with his case, the evidence establishes that, in addition to his job at Respondent, where his hours were generally from 7 p.m. to 2:30 a.m.,⁹ he also had a full-time job in a factory in Astoria, New York, where he worked from 8 a.m. to 5 p.m. According to Makris, Kiropoulos did not inform him of this other job when hired, and that during the time of his employment he observed that Kiropoulos was continually at rest. Makris testified that when he was informed by the night manager that Kiropoulos was too tired to do his job, he asked if he were really necessary in the kitchen. He asserts that, when he was told that the kitchen could get along without Kiropoulos, he decided to discharge him.

Although it is not entirely clear from the record, it appears that on Monday afternoon, March 31, Stamatopoulos, Kiropoulos, and Marinis went to the Union's offices to seek the Union's assistance in gaining the reinstatement of the two employees who had been discharged. According to the uncontradicted testimony of Makris, two union representatives visited him on that day and told him that they had a meeting scheduled with these employees later in the afternoon. Makris also testified that the two union agents accused him of discharging Kiropoulos and Stamatopoulos because of their union activities which he denied. He further states that they

² I credit the testimony of Makris that the door to this office is kept locked.

³ In addition, Marinis who is a personal friend of Koutsiftis, the maitre d', also used this office to change his clothes when the latter was present.

⁴ According to Marinis, Koutsiftis is a personal friend whom he has known for many years going back to when they both lived in Athens, Greece. It is noted that Koutsiftis, at the time of the hearing was a member of the Union having become a member a number of years ago.

⁵ The Company also asserts that Stamatopoulos was short in his cash register numerous times before the big shortage, but that these were in much smaller amounts. Stamatopoulos conceded that, prior to the \$55 or \$56 shortage, he had been spoken to about shortages on other occasions.

⁶ The record herein discloses a degree of friction between Marinis and the night waiters concerning the allocation of tips.

⁷ At the time of the hearing, the night manager, Kostas Antonakos, was not available as he was in Detroit, Michigan.

⁸ It does not seem plausible that Makris would have directed Marinis to go on the day shift without telling him when to do so.

⁹ Makris testified that his hours were supposed to be from 7 p.m. to 4 a.m.

asked him to sign up with the Union whereupon he invited them to have an election.

According to Kiropoulos, on Monday, March 31, when he went to pick up his final check, Antonakos told him that he had found out everything, and that he knew that Kiropoulos, along with Marinis and Stamatopoulos, had gone to the Union. Marinis also testified that, when he arrived at work that evening, Makris told him that he had found out that the employees had gone to the Union and with whom they had spoken to while there. According to Marinis, Makris also said, "I know exactly what you are doing, every step that you take that I know. . . ."

Makris testified that, after Kiropoulos was discharged, the latter's wife called him in an effort to have Kiropoulos reinstated. He states that during this conversation, where he learned that Kiropoulos was a distant relative, his wife accused him of discharging Kiropoulos because of the Union. He testified that he denied this accusation. Kiropoulos' wife did not testify.

The evidence in this case also established that after Marinis was notified of his discharge, Koutsiftis, the maitre d', interceded unsuccessfully on Marinis' behalf with Makris and told the latter that, if Marinis were kept on, he would not be involved in union activity. According to the testimony of Koutsiftis, Makris refused to reconsider the discharge of Marinis, and denied that union considerations had played a role in his decision.

III. ANALYSIS

In my opinion, the evidence establishes that the union activity commenced no earlier than March 21 when Stamatopoulos and Marinis met at a restaurant and decided to obtain union representation. It also is concluded that a group of union cards brought to Respondent's premises by Stamatopoulos was discovered in the office of Makris which then led him to interrogate both Marinis and Stamatopoulos as to whether they had brought in these cards. Inasmuch as this office was kept locked and contained cash, it therefore is understandable that Makris would have questioned those people who normally had access to his office to make sure that unauthorized personnel had not entered. Nevertheless, it is concluded that when Makris interrogated Marinis and Stamatopoulos about the union cards, he violated the Act.¹⁰

It is further concluded, based on the testimony of Marinis and Koutsiftis, that the latter warned Marinis that he could be discharged because of his union activity. While I am inclined to believe that Koutsiftis gave this warning as a matter of personal advice to a friend, this does not militate against the conclusion that such a statement was violative of the Act.¹¹

¹⁰ In *Strucksnes Construction Co., Inc.*, 165 NLRB 1062 (1967), the Board held that the polling of employees as to their union sympathies or activities would only be lawful if (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

¹¹ See *Belcher Towing Company*, 238 NLRB 446, 480 (1978).

As to the discharge of Stamatopoulos, the day bartender, I am of the opinion that it was not motivated by union considerations. In this instance, it is clear from Stamatopoulos' own testimony that prior to his union activity he had been accused of being \$55 or \$56 short in his cash register, an accusation which he acknowledges is tantamount to an allegation of theft. It therefore is concluded that, prior to March 21, the Company had come to the conclusion that Stamatopoulos was not the type of employee it wished to retain and that a decision had been made to terminate his services. Therefore it is concluded that this decision was made before he became involved with the Union.¹²

Given the conclusion that the discharge of Stamatopoulos was not motivated by illegal considerations, it therefore follows that the Company had a need to replace him. As such, I cannot conclude that when Makris decided to transfer Marinis to the day shift, that this action was motivated by illegal considerations, especially as there is credible evidence that Marinis was not getting along with the night waiters because of disputes over the allocation of tips. Accordingly, I conclude that this decision to change Marinis' hours was motivated by legitimate business reasons and was not motivated by Respondent's desire to retaliate against him because of his union activities. This conclusion is further buttressed by the fact that when Marinis offered to resign, after being interrogated about the union cards, Makris rejected the offer and told him to go back to work.

It is also my conclusion that, when Makris told Marinis of the switch in his hours, he told Marinis that the change was to commence on Monday, April 7. Accordingly, when Marinis disregarded this order and appeared at work on April 7 at 7 p.m., it is evident that his actions constituted insubordination. As such, it seems to me that the decision by Makris to discharge Marinis, when the latter failed to carry out a legitimate order, was motivated by good cause. I therefore conclude that the discharge of Marinis did not violate the Act, notwithstanding the prior interrogation of him and the warning by Koutsiftis, as the act of insubordination directly precipitated his firing, and was sufficient to warrant his discharge. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

In connection with Matheos Kiropoulos, it is evident that Makris' description of him as a tired worker is justified as Kiropoulos worked at one job from 8 a.m. to 5 p.m. while working at Respondent from 7 p.m. to about 2:30 a.m. I therefore credit the assertion by Makris that he had received a complaint about Kiropoulos' work from the night manager. I further credit his assertion that when he determined that Kiropoulos' services were not necessary, he decided to discharge him and operate the kitchen with one fewer employee. Therefore, notwithstanding the testimony of Kiropoulos that he had signed a card for the Union on March 25, that he had been confronted about this by Kostos Antonakos,¹³ and that he

¹² In reaching this conclusion, I am not making any finding that Stamatopoulos did steal any money.

¹³ It is concluded that the interrogation of Kiropoulos by Antonakos regarding the former's execution of a union card constitutes a violation of Sec. 8(a)(1) of the Act.

asked one other employee to sign such a card, it nevertheless seems to me that his union activity did not play a role in the decision to discharge him.

The General Counsel's allegation that Respondent created the impression of surveillance is based, *inter alia*, on the testimony of Kiropoulos to the effect that on Monday, March 31, after he had been discharged, he had a conversation with Antonakos who said that he was aware that certain employees including Kiropoulos and Stamtopoulos had gone to the Union's office. However, according to the uncontradicted testimony of Makris, knowledge of this visit was gained when union representatives visited him on Monday for the purpose of seeking the reinstatement of these two employees. In these circumstances I do not conclude that this conversation with a former employee can support the contention that the Company created the impression that it was engaging in surveillance of its employees' union activities. Nor do I conclude that a similar conversation between Makris and Marinis on Monday evening constituted a violation of the Act. Clearly when the employees in question arranged for a meeting with the Union for Monday to seek the Union's aid in having the discharges revoked, they should have realized that union representatives would likely contact the Employer for that purpose. As union agents did contact Makris on Monday for the purpose of obtaining reinstatement and did inform him of the scheduled meeting to take place with the individuals later that day, it was only natural and hardly sin-

ister for Makris to repeat what he had learned upon Marinis' arrival. In so doing, in the circumstances described herein, I cannot conclude that, when Makris told Marinis that he knew that employees had met with the Union, he thereby created the impression that he was engaged in surveillance of his employees' union activities.¹⁴

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating employees as to whether they signed union cards or brought such cards to Respondent's premises, Respondent violated Section 8(a)(1) of the Act.
4. By threatening employees with discharge if they continued to support the Union, Respondent violated Section 8(a)(1) of the Act.
5. Except to the extent as heretofore found, Respondent has not violated the Act in any other manner.
6. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

¹⁴ Cf. *Bankers Dispatch Corporation*, 233 NLRB 300, 307; *Aeon Precision Company* 239 NLRB 60, 63.